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JUDGES AS BULLIES

*Abbe Smith**

I. INTRODUCTION

It can't be easy being a judge. The responsibility is enormous: to protect and maintain the rule of law; determine facts and law; resolve disputes large and small; and, in criminal matters, decide whether a fellow citizen remains free or not. In essence, we look to judges to articulate the meaning of "justice"—no doubt knowing all the while, as Clarence Darrow famously noted, "There is no such thing as justice, in or out of court."¹

I like and respect some judges, but not as many as I should. While some judges have the requisite ability and temperament for the bench—knowledge of the law, independence, fairness, patience, courage, compassion, and humility—too many do not. Too many are mean-spirited and arrogant, going out of their way to insult, ridicule, and demean those who come before them. In short, they are bullies.²

Bullies on the bench may be an inevitable result of our politicized process of judicial selection,³ especially on the state level, where most

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1. Clarence Darrow, *Attorney for the Defense*, ESQUIRE, May 1936, at 36, 36-37; see also ALAN DERSHOWITZ, *THE BEST DEFENSE*, at xvii (First Vintage Books ed. 1983) (1982) ("Most judges have little interest in justice.").

2. For example:

When judges move beyond occasional displays of anger, frustration, or impatience and intentionally abuse or denigrate those who appear before them, they may be fairly described as bullies. This label is apt because bullying is characterized by a power imbalance between bullies and their targets, and judges unquestionably wield great power over lawyers, litigants, jurors, and witnesses. When individual judges bully, they expose all judges to public contempt.

Douglas R. Richmond, *Bullies on the Bench*, 72 LA. L. REV. 325, 330 (2012).

3. See generally *id.* (examining the limits on intemperate judicial behavior).

judges are elected.⁴ Politics doesn't usually bring out the best judges or the best in judges.⁵ Becoming a bully may also be an occupational hazard. When your daily life consists of sitting in an elevated position in judicial robes, with people bowing and scraping before you, it likely goes to your head. As Steven Lubet says, judges are the "maximum boss" and "[e]veryone else is a supplicant."⁶

This Essay is not about the judges I like and respect, but the ones who have become (or perhaps always were) bullies. Because I am a criminal defense lawyer who has practiced almost entirely in state criminal courts, my stories tend to come from those courts. It might also be that judges are at their worst when they preside over criminal matters. As Alan Dershowitz has written:

In my . . . experience in the practice of law, I have been more disappointed by judges than by any other participants in the criminal justice system. This is partly because I, like so many others, expected so much of these robed embodiments of the law. When I began to practice, I naïvely assumed that other judges would be as honest in their approach to the law, as sensitive to constitutional rights, as concerned about human beings, as were the two judges for whom I had clerked. I have been keenly disappointed. Beneath the robes of many judges, I have seen corruption, incompetence, bias, laziness, meanness of spirit, and plain ordinary stupidity. I have also seen dedication, honesty, hard work, and kindness—but that is the least to which we are entitled from our judges. If I emphasize the negative side of the judiciary, that is because it is more noteworthy than the positive, and also because it threatens to corrupt the integrity of the American legal process.⁷

4. See generally KATE BERRY, BRENNAN CTR. FOR JUST., HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES (2015), http://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf (reporting that the vast majority of criminal cases are adjudicated by elected state judges and the pressures of re-election and retention campaigns make judges more punitive toward defendants in criminal cases); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003) (critically examining judicial elections).

5. See Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 781-96 (1995) (discussing the impact of unpopular decisions by judges in capital cases on judicial elections and promotions).

6. Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 11, 12 (2001). Lubet points to the "stylized demonstrations of obeisance" in litigation: "We stand when the judge enters and leaves the room. Our 'pleadings' are 'respectfully submitted.' Before speaking, we make sure that it 'pleases the court.' We obey the judge's orders and we even say 'thank you' for adverse rulings." *Id.* But note, I specifically instruct my students not to thank judges for adverse rulings. They say, "Very well."

7. DERSHOWITZ, *supra* note 1, at xvii-iii.

When judges become yet another bully in our notoriously punitive criminal justice system,⁸ our individual and collective rights don't stand a chance.⁹ It is not surprising that our prison population continues to hover at more than two million,¹⁰ a disproportionate number of which are people of color,¹¹ given those doing the sentencing. I do not mean to take prosecutors off the hook in saying this.¹² Their charging decisions have enormous impact.¹³ But the sentencing power ultimately lies with judges.¹⁴

In sharing stories about judges as bullies, I mean to call attention to a problem that is more widespread than many people believe—especially judges. When told about the brazenly bad behavior of their brethren, judges are often incredulous. How quickly they forget their own experience as lawyers. How quickly they assume the role of judge

8. See also David Cole, *Punitive Damage*, N.Y. TIMES, May 18, 2014, at 24 (noting that the United States is the leader in putting people behind bars). For an entertaining critique of our harsh criminal and penal system, see Katie Rose Quandt, *Watch John Oliver Explain the Insanity of Our Prison System with Puppets*, MOTHER JONES (July 21, 2014, 8:45 PM), <http://www.motherjones.com/mixed-media/2014/07/john-oliver-prison-system-sesame-street-puppets>. See generally MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015) (examining the rise of mass incarceration in the United States); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003) (comparing harsh criminal justice practices in the United States with criminal justice practices in Europe).

9. See GOTTSCHALK, *supra* note 8, at 1 (calling the reach of the criminal justice system “truly breathtaking” and noting that more than eight million people—or one in twenty-three adults—are under some form of state control).

10. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POL'Y INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html> (reporting that the U.S. criminal justice system “holds more than 2.3 million people in 1,719 state prisons, 102 federal prisons, 901 juvenile correctional facilities, 3,163 local jails, and 76 Indian Country jails, as well as in military prisons, immigration detention facilities, civil commitment centers, and prisons in the U.S. territories”).

11. See *Issues: Racial Disparity*, SENT'G PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Nov. 15, 2017) (reporting that more than sixty percent of people in prison are racial and ethnic minorities and, one in ten black males in their thirties is in prison or jail on any given day).

12. See generally Abbe Smith, *Are Prosecutors Born or Made?*, 25 GEO. J. LEGAL ETHICS 943 (2012) (critically examining the culture and ethics of prosecutors); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001) (discussing the morality of prosecution in the context of mass incarceration).

13. See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1495-97, 1501, 1508-09, 1518 (2010); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1505-17 (1993) (discussing the shift in power dynamics toward prosecutors after the introduction of sentencing guidelines at the federal level); see also Yue Ma, *A Comparative View of Judicial Supervision of Prosecutorial Discretion*, 44 CRIM. LAW BULL. 30, 33-36, 49-51 (2008) (discussing American prosecutors' charging authority).

14. See ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.3 cmt. (AM. BAR ASS'N 1999) (“Although charging is felt to be an executive function, sentencing has been ‘primarily a judicial function.’” (citing *Mistretta v. United States*, 488 U.S. 361, 390 (1989))).

and become apologists for others. This may also be a product of isolation. Judges seldom visit each other's courtrooms and know little of what goes on there.

I worry, too, that lawyers simply get used to being bullied. It starts early: law students who appear in court as part of a clinic, externship, or summer job are regularly slapped down by judges. I have never understood why judges would treat law students badly, instead of encouraging them. The people we represent—most of whom are poor and have been pushed around their whole lives—have gotten used to even worse treatment.

A favorite story that makes the point about lawyers putting up with mean, abusive judges involves a former public defender colleague. When he broke his hand, he brought his wife to court to take notes for him in a dozen or so preliminary hearings. At the end of the day, as my colleague was packing up, he saw that his wife was crying. She was distraught at the way the judge had treated him. My colleague hadn't even noticed.

Prominent lawyer and law professor Michael Tiger had a similar experience when he argued *Gentile v. State Bar of Nevada*,¹⁵ a case involving the free speech rights of lawyers, before the U.S. Supreme Court. As Tiger was making his rebuttal argument, Justice White began to loudly upbraid him. Tiger's eight-year-old daughter, seated in the front row with his wife, couldn't stand it any longer and wailed, "Mommy, why is that man yelling at Daddy?"

Unfortunately, the system is full of bullies, even in very high places.¹⁶ Criminal defendants are regular targets and so are their lawyers. Getting slapped down, dressed down, and put down is part of the job.

Although most of the material in this Essay is anecdotal, it is only a small part of a voluminous cache of such stories. I have practiced criminal law for more than thirty years in five different jurisdictions and have been privy to the court experiences of many other lawyers, including former students and fellows, over much of the United States.

15. 501 U.S. 1030 (1991).

16. See, e.g., Jeffrey Toobin, *Looking Back*, NEW YORKER (Feb. 29, 2016), <http://www.newyorker.com/magazine/2016/02/29/antonin-scalia-looking-backward> (calling Supreme Court Justice Antonin Scalia's legacy a largely failed mission to make the United States less fair, tolerant, and admirable, and describing him as "[b]elligerent with his colleagues, dismissive of his critics, [and] nostalgic for a world where outsiders knew their place and stayed there"). See generally Albert W. Alschuler, *How Frank Easterbrook Kept George Ryan in Prison*, 50 VAL. L. REV. 7 (2015) (documenting bullying and lying by a highly regarded Federal Appeals Court judge).

Judicial bullies run the gamut. There are smart bullies and stupid ones, experienced bullies and novices, bullies that pick on some people and parties in particular, and equal opportunity bullies. Although in my experience, judicial bullies tend to be more male than female, they come in all different shapes, sizes, races, and ethnicities. They also come from different practice backgrounds: sadly, former defense lawyers can become bullies too (these judges can be especially oblivious about this, believing they are a cut above their judicial colleagues). For organizational purposes, I have identified four major categories of judges as bullies as follows: (1) ignorant and incompetent bullies; (2) thin-skinned and ill-tempered bullies; (3) power-hungry bullies; and (4) biased bullies.

II. IGNORANT AND INCOMPETENT BULLIES

I wish I could say this is a tiny category. It's not. One of my very first court appearances as a public defender was at a preliminary hearing in South Philadelphia before a judge who chastised me for citing U.S. Supreme Court law. "Ms. Smith," he seethed. "Are you citing a U.S. Supreme Court case in this courtroom? Do you know where you are?" Apparently, the judge thought South Philadelphia was his own personal jurisdiction, immune to federal constitutional law.

When I shared this story with a longtime civil poverty lawyer, she offered a remarkably similar experience that happened in Boston. In the course of a trial, she made an objection on relevance grounds. "Relevance?" the trial judge sneered. "Relevance may be important to the Supreme Court, but we don't care about such things here."

A former fellow had a similar experience in a trial in the Bronx. He objected to the introduction of certain evidence under the Confrontation Clause of the Sixth Amendment, citing the U.S. Supreme Court case of *Crawford v. Washington*.¹⁷ The judge was not impressed. "You're going to need to cite a New York Court of Appeals case," she said.

These judges exemplify what Alan Dershowitz means by "ordinary stupidity."¹⁸

Another example is Mississippi Chancery Court Judge Talmadge Littlejohn, who achieved notoriety in 2010 when he jailed a lawyer for criminal contempt for failing to stand and recite the pledge of allegiance in court.¹⁹ The lawyer spent a half-day in jail before Judge Littlejohn

17. 541 U.S. 36 (2004).

18. DERSHOWITZ, *supra* note 1, at xviii.

19. Richmond, *supra* note 2, at 326.

released him to appear on behalf of another client.²⁰ I suppose Littlejohn deserves credit for his subsequent acknowledgment that he had violated the lawyer's First Amendment rights and for promising never to do it again.²¹ But his disciplinary troubles before the Mississippi Commission on Judicial Performance and, ultimately, the Mississippi Supreme Court did not end there.²²

This story reminds me of a judge who threatened to hold a lawyer in contempt for refusing to refer to the judge as "Your Honor." The lawyer—a talented criminal trial lawyer who also taught at a local law school—demurred. She maintained that, so long as she was respectful, she could refer to the judge by other nomenclature, such as "Judge," "Judge and the judge's name," "Sir," or "The Court." He disagreed.²³ She had to retain counsel to defend herself in contempt proceedings, but was ultimately vindicated.

This same judge, who felt he was entitled to an honorific, was known to wear house slippers to court—the leather, backless kind my grandfather used to shuffle around in. This did not exactly convey respect for his rank.

My students, fellows, and I regularly appear before a judge who might be mentally ill. He rants, raves, and scolds about things that have little or nothing to do with the case before him. He free-associates, going from one topic to the next. He can hold forth in this manner endlessly, losing control of his calendar and prolonging the agony of everyone waiting to appear before him. He gets angry if we attempt to redirect him to the matter at hand.

I have appeared before judges who believe that character evidence is inadmissible hearsay, defense witnesses—simply because they are called by the defense—are biased and unworthy of belief, and police officer "good faith" is a defense to all constitutional violations. While these may seem complex to a layperson, they are pretty simple to anyone schooled in the law.

20. *Id.* at 326-27.

21. *Id.* at 327. Judge Littlejohn came away with a public reprimand and \$1000 fine for his misconduct. *Id.* He remained on the bench until he died suddenly, at age eighty, in 2015. Lynn West, *Judge Talmadge Littlejohn, 80, Dies Suddenly*, NEW ALBANY GAZETTE (Oct. 28, 2015), http://www.djournal.com/new-albany/news/judge-talmadge-littlejohn-dies-suddenly/article_2b5f5c0c-9be6-5906-b4f9-ae55a6bf76f.html.

22. *See* Miss. Comm'n on Judicial Performance v. Littlejohn, 2014-JP-01184-SCT (¶¶1-4) (Miss. 2014) (suspending Littlejohn from office for thirty days without pay, fining him \$1000, publicly reprimanding him, and ordering that he pay court costs for jailing a man for failure to pay child support when the matter was under appeal).

23. This behavior could also be in the thin-skilled and ill-tempered bully category, as well as the power-hungry category. I acknowledge there is some overlap among the categories.

One lower criminal court judge insisted that lawyers appearing before him preface everything they say by asking, “May I be heard?” This may be life imitating art, or art imitating life. The CBS television program “The Good Wife” featured a judge who insisted that lawyers qualify everything they said in her courtroom with “in my opinion.”²⁴

Law students and young lawyers expect judges to be like their best, most able professors, nimble and knowledgeable. Appearing before a judge who is the opposite is a great challenge for them. It is difficult to craft an effective argument for judges bewildered by the most basic procedural and evidentiary rules, and who say and do idiotic things with no awareness of their idiocy. Moreover, young, smart, well-prepared lawyers can be particularly threatening to these judges.

III. THIN-SKINNED AND ILL-TEMPERED BULLIES

Early in my career, I represented an indigent defendant accused of setting fires in Center City, Philadelphia. Because of the serious charges, he was held without bond pending a preliminary hearing. This was the third time the hearing had been scheduled; the prosecution had succeeded in putting it off twice before. During this time—while my client was in custody—other suspicious fires were happening, suggesting someone other than my client was the perpetrator. Again, the prosecution asked for a continuance, vaguely pointing to ongoing investigation. I objected and asked that the case be dismissed or my client released. I pointed to the presumption of innocence, the real possibility of actual innocence here, and the unfairness of holding a person in jail while the prosecution gets its case in order. I kept arguing after the judge had ruled in the prosecution’s favor. I couldn’t seem to stop even though I knew it was a lost cause. I was playing to the courtroom, which was with me. This, of course, made the judge madder. He stormed off the bench, declaring there was no public defender in this courtroom and all my cases would be continued. He demanded the phone number to the chief public defender, which I gave him.

The problem was my clients were in custody. Although there was no guarantee they would be released if a hearing was held, they would definitely remain locked up with no hearing. I could not sacrifice them. I asked the court clerk to summon the judge. When he appeared, I

24. *The Good Wife’s 14 Most Memorable Judges—In Our Opinion*, CBS, http://www.cbs.com/shows/the_good_wife/photos/1005658/the-good-wife-s-14-most-memorable-judges-in-our-opinion/101699/judge-patrice-lessner-ana-gasteyer- (last visited Nov. 15, 2017) (referring to *Fleas* (season one, episode sixteen) in which Judge Patrice Lessner insists that every lawyer in her courtroom follow an argument or statement with “in my opinion”).

apologized profusely. I meant no disrespect, had gotten carried away, and hoped the judge would forgive me. I was reinstated.

The ability to apologize with seeming sincerity is essential in dealing with thin-skinned judges. Most trial lawyers become expert apologizers who, out of necessity, develop the ability to articulate exactly what a peeved judge needs to hear. The challenge is to make sure the performance of a beautifully crafted apology does not appear to be a performance. This skill is also helpful in long-term relationships.

Apologetic lawyers have less impact on chronically ill-tempered judges who prefer to nurse their wounds rather than having them redressed.

I later learned that when the judge who stormed off the bench called my office, the chief defender backed me completely and refused to send another lawyer in my place. They trusted that I would handle it. This was good to know.

Thin-skinned and ill-tempered judges are quick to hold lawyers in contempt—almost always for continuing to talk when a judge says not to (this reality makes being held in contempt far less glamorous than might be imagined).²⁵ Although it is noteworthy when judges hold lawyers in contempt, it is not uncommon.²⁶ In 2007, a D.C. Superior Court judge threatened a young public defender with contempt and had her shackled and put in a holding cell for not obeying his order to sit down and be quiet.²⁷ The judge, an older white man, apparently lost patience with the public defender, an African American woman, who continued to argue with the judge. “Step her back, please. Step her back. Step the woman back, please. She won’t listen to what I’m saying. She’s disrupting the court,” the judge said.²⁸ “Step her back. I’m sorry to have to do this, ma’am, but I don’t know what else to do.”²⁹

25. See generally Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power—Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477 (1990) [hereinafter Raveson, *Advocacy and Contempt, Part One*] (arguing that the judicial contempt power ought to be limited because it chills zealous advocacy); Louis S. Raveson, *Advocacy and Contempt—Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743 (1990) [hereinafter Raveson, *Advocacy and Contempt, Part Two*] (same).

26. See Raveson, *Advocacy and Contempt, Part One*, *supra* note 25, at 506-07, 509, 546-47, 567, 569, 573; Raveson, *Advocacy and Contempt, Part Two*, *supra* note 25, at 762-63, 767 n.84, 789 n.147.

27. Keith L. Alexander, *Colleagues Back Lawyer Detained in Dispute with Judge*, WASH. POST (Sept. 5, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/04/AR2007090402065.html>.

28. *Id.*

29. *Id.*

One Boston judge was known to hold lawyers in contempt for random things she did not like, such as peering through the glass door in her courtroom.

Some judges go beyond holding lawyers in contempt or locking them up. A couple of years ago, one judge took a punch at a public defender.³⁰ Angered by Andrew Weinstock's refusal to waive his client's speedy trial rights, Brevard County, Florida, Judge John C. Murphy said, "[I]f I had a rock, I would throw it at you right now" and threatened to "go out back" and "beat [Weinstock's] ass."³¹ The judge then made good on the threat by going out into the hall and punching Weinstock in the head.³² The judge was suspended for a short while, sent to anger management classes, and returned to the bench.³³

I confess I am not always adept at dealing with thin-skinned, ill-tempered judges. I don't understand why these personality types become judges in the first place, aside from sheer ambition. Courtrooms are not for the faint of heart—or thin of skin. The adversary system can be rough and tumble. This is as it should be: at its best, advocacy is spirited and fierce.³⁴ Of course, judges have a responsibility to control their courtrooms and rein in excessive behavior, but they should take in stride lawyers who are simply being vigorous advocates.

Still, there is inherent friction between lawyers and judges. As prominent legal ethicist and trial lawyer Monroe Freedman noted:

The problem is, in part, one of perspective. Along with a great deal of mutual respect between judges and the lawyers who appear before them, there is also a considerable amount of tension between them. One probable reason for that tension is the fact that the judge and the advocates have different functions. The lawyers are committed to seek justice as defined by the interests of their clients, while the judge is dedicated to doing justice between the parties. From the perspective of the judge, therefore, at least one lawyer in each case is attempting to achieve something to which her client is *not* entitled. From the

30. *Brevard Judge Tells Attorney 'I'll Beat Your Ass,' Allegedly Throws Punches*, WFTV-9 ABC, http://www.wftv.com/news/local/brevard-judge-accused-punching-public-defender_ngcgc/107406474 (last updated June 3, 2014, 6:39 AM).

31. *Id.*

32. *Id.*

33. Jacob Gershman, *Public Defender Quits After Judge in Courtroom Fight Returns to Bench*, WALL ST. J.: L. BLOG (July 8, 2014, 1:41 PM), <http://blogs.wsj.com/law/2014/07/08/public-defender-quits-after-judge-in-courtroom-fight-returns-to-bench>.

34. See Raveson, *Advocacy and Contempt, Part One*, *supra* note 25, at 514 (noting that "some level of emotional reaction, some degree of temporary animosity, and a measure of turmoil, are part of the natural processes of trial advocacy").

perspective of the lawyer, however, the judge is always poised to deprive her client of something to which the client *is* entitled.³⁵

As I acknowledged above, I'm not always at my best with thin-skinned, ill-tempered judicial bullies. One instance was memorable: a misdemeanor assault trial with a student before a peevish and somewhat junior judge. Investigation had yielded a viable defense of self-defense supported by credible evidence, the student was well prepared and able, and our client was a middle-aged woman with no prior record and a plausible story. But the judge was doing everything possible to impede our efforts: sustaining every baseless objection by the prosecutor; restricting the number of witnesses we could call; and generally helping the prosecutor prop up a weak government case.

Although I generally try to keep a poker face at trial,³⁶ I was apparently not hiding my dismay. The judge called me to sidebar. "Ms. Smith," he said, "Your facial expressions are conveying your dislike of this Court's rulings." "With all due respect, Your Honor," I replied, "that's *restraint*."

This did not go over well.

I tried to explain that, while I am a clinical supervisor, I am also a defense counsel. Lawyerly devotion and zeal are part of the package, both as an ethical obligation and model for students. I offered one of my favorite lines from the Court of Appeals for the D.C. Circuit: "A criminal trial is not a minuet."³⁷ I offered to go out for a beer when the case was over to discuss why I was so upset with the judge's rulings.

The judge was not mollified and did not seem interested in getting together after the trial.

I later realized I had blown a rare opportunity to quote Mae West, who, during a trial for indecency, was confronted by the trial judge about her attitude: "Miss West, are you trying to show contempt for this court?" She replied, "On the contrary, Your Honor. I was doing my best to hide it."

I suppose it could be said that, like the judges I'm criticizing, I can be a little thin-skinned. I did not take the judge's rulings in stride. But at

35. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 73 (1990).

36. I do so for both tactical and ethical reasons. First, a temper tantrum is not usually persuasive. Second, lawyers have an ethical obligation to "demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." MODEL RULES OF PROF'L CONDUCT pmbl. para. 5 (AM. BAR ASS'N 2016). And to avoid conduct that is "prejudicial to the administration of justice." *Id.* r. 8.4(d). There is a little leeway, however. As part of our duty to the client, the legal profession, and the justice system, lawyers are allowed to confront and challenge the "rectitude of official action." *Id.* pmbl. para. 5.

37. Taylor v. United States, 413 F.2d 1095, 1096 (D.C. Cir. 1969).

least it was on behalf of someone else. It is hard to strike the right tone with a judge who is often-wrong-but-never-in-doubt. Lawyers have to swallow our pique, do what we can to convince the judge to do the right thing, and at the very least, make a decent record.

Still, some judges are so unpleasant it's hard to make a cogent argument in their presence. One judge literally snarls at attorneys who come before her, avoids eye contact except to scowl, and can't seem to speak in other than a snarky tone. Once, she told a post-graduate fellow who was especially self-possessed and inscrutable to "wipe that sour expression off your face." But she had no expression on her face! I spent two years working closely with this fellow and could never tell what she was thinking.

IV. POWER HUNGRY BULLIES

Some judges just seem to enjoy the power. Whatever motivated them to become a judge, now they mostly like to throw their weight around. They are a judicial version of the *New Yorker* cartoon in which a police car is emblazoned with the words, "We're cops and you're not."

Sarcasm is a favorite tool of these judges. Mocking others—especially those who can't fight back—seems to bring them enjoyment. Copious eye-rolling often accompanies the sarcasm. Apparently making others feel small makes them feel big.

One judge was known for rolling his eyes at defense witnesses and wheeling his chair around to turn his back on them in the presence of a jury. He ran his courtroom like a game show, coming down from the bench to talk directly to jurors and people in the audience. A former colleague had a trial before this judge. He was arguing a post-verdict motion in which he alleged that the judge had made highly improper comments to the jury during the trial. The comments were inflammatory and the judge was incensed with my colleague for making such allegations. "How dare you say these things!" the judge said. "I would never say such outrageous things in all my life. It is disgraceful that you should make such claims." My colleague replied, "Judge, I'm reading directly from the transcript. It's on page seventy-nine." The judge was not chastened. He huffed and snorted and muttered that it was all harmless. On appeal, the defense pointed out that the judge's fury over the allegations belied his conclusion that his misconduct was harmless. Unfortunately but not surprisingly, the appeals court ruled the comments were harmless.

Perhaps my colleague quoting from the transcript had something to do with what this judge did when I was before him. In the middle of

trial, as I was about to call the first defense witness, the judge called me to sidebar. He leaned down and told the court reporter not to take down what he was about to say as it was “off the record.” He then threatened to sentence my client to the maximum if I called her daughter as a witness. I told the court reporter to put on the record exactly what the judge had just said, which I repeated verbatim. The judge went nuts.

Speaking of court reporters, a judge who apparently didn’t like having to deal with my (admittedly frequent) objections to his (often insane) rulings said to me, “Ms. Smith, every time you talk, this poor man—pointing to the court reporter—has to transcribe it. And he’s not getting any younger.” As it happened, this particular court reporter was sort of ancient. But what was I supposed to do about that?

One judge yelled at me throughout the entire voir dire (jury selection) process. He conducted the initial questioning of prospective jurors, but allowed the attorneys to ask follow-up questions. Yet, every time I asked a question he became enraged (though he would subsequently ask many of my questions). Out of the presence of jurors, he finally exploded. “Ms. Smith,” he said, “You are making this process take much longer than it should.” “Your Honor,” I demurred. “I’d like to see the transcript. I bet you yelling at me is taking much more time than my questions.”

I have to watch myself. Judges (and prosecutors) do not always appreciate my sense of humor.

A former student who was a relatively new public defender was assigned to appear before a juvenile court judge who required all lawyers in his courtroom to sign a contract with all kinds of rules for conduct in his courtroom, including being in court fifteen minutes before a case was scheduled, not arguing after the judge had ruled—not even to make a record, limiting objections to a single word, and keeping closing arguments to fifteen minutes no matter how complex the case. This was arguably a conflict of interest for defenders who essentially have a “contract” with their clients to pursue their interest, not the judge’s.

A lawyer who appeared before a judge well before her case was scheduled to commence was met with hostility because the judge’s previous case had concluded early and the judge had been waiting for twenty minutes with nothing else to do. The judge would not let her argue the scheduled matter, saying, “Nobody wastes this Court’s time.”

I tried a misdemeanor police assault case with a fellow that lasted several days, because the judge kept interrupting the trial to hear other matters. One day was especially frustrating. We were scheduled to begin first thing in the morning, only to have the case called at ten minutes before the luncheon recess. We were told we would resume promptly at

2:00 p.m., but other matters again got in the way. By the time the trial was called, we got through barely twenty minutes of testimony before the court adjourned for the day.

When the judge said we would resume first thing the next day, I was anxious. I inquired whether the trial might be put off until the following day instead. I explained that my last legal ethics class of the semester was scheduled for the next day, there were nearly 100 students in it, and the class could not be rescheduled. The judge asked what time the class was. I said 3:30 p.m. This made the judge angry.

“That is ridiculous, Ms. Smith,” he said. “What makes you think we won’t be finished with this trial by tomorrow afternoon?” I swallowed hard and said, “I guess I have a little PTSD from today.” The judge—who was known for having a temper with lawyers, but who, to his credit, was always courteous to criminal defendants—lost it. I am not sure I have ever received such a dressing down by a judge. He said my remark was “outrageous” and “disrespectful.” He refused to hear anything further from me, would not accept an apology, and stormed off the bench.

I don’t know why my tongue-in-cheek comment set him off. I had appeared before him many times and he was a big supporter of the Georgetown clinical program. He was a former defense lawyer with a reputation for being smart and fair. I thought our relationship was solid enough to withstand a little teasing. Clearly, I got that wrong.

I prostrated myself before him. I followed up my in-court apology with an email expressing regret at the offense I had caused. My remark was a poor attempt at humor, I wrote. I had nothing but respect for the court and trusted he would not hold this unfortunate incident against my students, fellows, or clients. This last thing was a pressing concern; we were still in trial.

I received no reply. The next day, when the case was called for trial, I asked to approach to make sure all was well. It wasn’t. In the presence of the fellow and the prosecutor, the judge dismissed the idea that I had meant to be humorous, and launched into another rebuke. I have repressed the substance of it because it was so shaming. I felt about an inch tall.

I sometimes fall back on an article in the *New York Times Magazine* called “How to Take a Punch.” The article quotes seventeen-year-old Claressa Shields, the first American woman to win an Olympic gold medal in boxing, in 2012.³⁸ She says you should never shut your eyes when you’re about to be punched, and should try to avoid even

38. Malia Wollan, *How to Take a Punch*, N.Y. TIMES, May 13, 2016, (Magazine), at 33.

blinking.³⁹ Instead, you should “watch the fist come in and learn from it.”⁴⁰ “To counter a swing to the face,” you should “duck your head to the side,” a tactic called “slipping.”⁴¹ This is because, “even if it doesn’t hurt,” “[a] blow to the face looks bad.”⁴² Whatever you do, Shields counsels, “don’t get angry. Don’t let yourself be overtaken by fear, spite or rage. . . . If you get hit, tell yourself: It’s just one punch.”⁴³

It was just one punch, I said to myself, as we went forward to trial. I can take it. I’ve taken worse. I also told myself that I did what I could to protect the client. This is not about me. We ultimately obtained an acquittal. Nothing heals a punch quicker.

After talking about this Essay with a handful of clinical teacher friends, it appears that power hungry judicial bullies might have a special hostility towards clinical teachers. The clinical teacher slap down is painfully familiar to all of us. One clinical colleague and her student were representing a woman who lived with her sister and helped raised the sister’s baby. The child was two years old and had lived with their client her whole life. When the child was in daycare, the mother at home, and the aunt at work, a fire broke out in the home, causing the mother’s death. When the father of the child—who had a history of abusing the mother, and had had no contact with the child—suddenly appeared, my colleague and her student went to court on an emergency motion to have their client declared a de facto parent. It was an emotional situation. My colleague, the clinical professor, was arguing. The father of the child was represented by an obnoxious, overbearing lawyer, who kept interrupting my colleague, and the judge was doing nothing to stop it. Finally, my colleague turned to the lawyer and said, “Please stop interrupting me.” The judge became furious at my colleague and said, “I’ll decide who gets to speak and when. You’re not in the classroom now, Professor.”

Another clinical colleague, who specializes in family law and domestic violence, was ordered by a judge not to talk to her client during a civil trial. This was to prevent her from counseling her client, who was currently on the witness stand, about the content of the client’s testimony. But the order went well beyond not advising a testifying

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

client.⁴⁴ Speechless with surprise, she adhered to the judge's order. When she regained her equilibrium she explained to the judge that he cannot order her to violate core ethical responsibilities—communicating with a client, providing advice, and providing competent representation—and that her client also had a due process right to confer with counsel. The fact that my colleague was a law professor seemed to irk rather than impress the judge.

Many judges hate the “whispering” (also known as consulting) that is part of clinical supervision at a trial. It's like we're trying to pull a fast one. I'm glad they tend to take this out on the supervisor, not the student.

V. BIASED BULLIES

It is axiomatic that judges are supposed to uphold the independence, integrity, and impartiality of the judiciary.⁴⁵ No matter how consciously or unconsciously biased judges may be as individuals, they are supposed to do better when they are on the bench.⁴⁶ Judges are supposed to be scrupulously fair, open-minded, even-handed, and unbiased.⁴⁷

Yet, there is well-documented racial disparity in criminal sentencing.⁴⁸ In twelve states—Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia—more than half of the prison

44. See *Geders v. United States*, 425 U.S. 80, 91 (5th Cir. 1976) (holding that a trial court's order prohibiting attorney client communication during a trial violated a criminal defendant's Sixth Amendment right to counsel). *But see Perry v. Leeke*, 488 U.S. 272, 284-85 (4th Cir. 1989) (allowing such a prohibition during a brief recess when a defendant is on the stand, but cautioning that prohibiting lawyer-client consultation should not be automatic).

45. See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR. ASS'N 2010) (“A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”).

46. See *Judges: Six Strategies to Combat Implicit Bias on the Bench*, A.B.A. (Sept. 2016), <https://www.americanbar.org/publications/youraba/2016/september-2016/strategies-on-implicit-bias-and-de-biasing-for-judges-and-lawyer.html> (reporting about a program at the annual American Bar Association conference on implicit bias and de-biasing strategies for judges and lawyers, and recommending techniques and strategies for confronting bias). See generally Jeffrey Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (finding that judges harbor the same kinds of implicit biases as others; these biases can influence their judgment, but, with sufficient motivation, judges can compensate for the influence of bias).

47. See MODEL CODE OF JUDICIAL CONDUCT Canon 1.

48. See ASHLEY NELLIS, SENTENCING PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 3, 8 (June 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons> (documenting that African Americans are incarcerated in state prisons at five times the rate of whites, and at least ten times the rate in five states).

population is black.⁴⁹ Maryland tops the nation: though African Americans are about 30% of the state's population,⁵⁰ they make up 72% of the prison population.⁵¹ In Oklahoma, the state with the highest overall black incarceration rate, one in fifteen adult black males is in prison.⁵²

When considered in conjunction with the growing length of sentences, the bullying becomes more vivid. According to a recent study, the average time served in state prison has grown by about 37%, with the sentences of the top 10% serving the longest sentences up by 42%.⁵³ For instance, in Michigan, a ten-year sentence was the average sentence of long-serving prisoners in 1989.⁵⁴ By 2013, these prisoners were serving twenty-six years.⁵⁵

Notably, we are locking up very young people for very long periods of time. The study found that two out of five of those serving the longest terms were sentenced before age twenty-five.⁵⁶ In view of the impact of race on sentencing, it is no wonder that in some neighborhoods you barely see any young African American men, and black women seem to way outnumber black men.⁵⁷

49. *Id.* at 3.

50. *QuickFacts: Maryland*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/MD/PST045216> (last visited Nov. 15, 2017).

51. NELLIS, *supra* note 48, at 3.

52. *Id.*

53. Manuel Villa, *How To Count the Hidden Prisoners: A New Study Examines the Lingering Impact of War-on-Crime Policies*, MARSHALL PROJECT (July 18, 2017), https://www.themarshallproject.org/2017/07/18/how-to-count-the-hidden-prisoners#.2R6M7lvYc?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20170719-803 (reporting the findings of a new report by the Urban Institute's Justice Policy Center, which examined data from forty-three states and Washington, D.C.).

54. *Id.*

55. *Id.*

56. *Id.*

57. See Justin Wolfers et al., *1.5 Million Missing Black Men*, N.Y. TIMES: THE UPSHOT, (Apr. 20, 2015), https://www.nytimes.com/interactive/2015/04/20/upshot/missing-black-men.html?_r=0 (finding that for every hundred black women not in jail, there are only eighty-three black men, and the remaining men—1.5 million of them—“are, in a sense, missing”). The numbers are disturbing:

In New York, almost 120,000 black men between the ages of 25 and 54 are missing from everyday life. In Chicago, 45,000 are, and more than 30,000 are missing in Philadelphia. Across the South—from North Charleston, S.C., through Georgia, Alabama and Mississippi and up into Ferguson, Mo.—hundreds of thousands more are missing.

They are missing, largely because of early deaths or because they are behind bars. . . . African-American men have long been more likely to be locked up and more likely to die young, but the scale of the combined toll is nonetheless jarring. It is a measure of the deep disparities that continue to afflict black men—disparities being debated after a recent spate of killings by the police

Id.

Judges bear significant responsibility for this persistent, grim reality. Although there are myriad factors underlying mass incarceration and its disproportionate impact on black and brown people,⁵⁸ judges often have the last word.⁵⁹

This is the most important and destructive kind of biased bullying—the kind that puts some people in prison more than others for no other reason than their race or ethnicity. In sharing other examples, I do not mean to diminish this core example.

Judges have been shown to be biased in favor of the prosecution in criminal cases for many reasons, especially elected judges.⁶⁰ Most criminal defense lawyers experience this reality not anecdotally but daily. I once drew a cartoon (I am an erstwhile and still occasional cartoonist) that featured a public defender saying, “Good morning” to a judge, the prosecutor objecting, and the judge sustaining the objection. This pretty much sums it up.

Because overt racial bias is strictly forbidden, and judges are mindful of this, one seldom hears of a judge using the “n-word” or other overt expressions of racism.⁶¹ Still, other expressions of racial, ethnic, and gender bias inevitably leak out.

A judge took the bench in an empty courtroom awaiting an attorney with an emergency motion. Court officers and clerks were in the courtroom. The judge was told that an attorney with a Jewish last name—let’s say Greenberg—was on his way. The judge proclaimed, “Greenberg is on his way? Turn on the ovens!”

A Jewish civil poverty lawyer and her colleague, a man whose last name is Kelly, appeared in court on a matter. They introduced themselves to the judge. The judge turned to the male lawyer and said,

58. See JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 13-14 (2017) (noting that mass incarceration did not happen overnight and it consisted of many components, including legislators, police, prosecutors, defense lawyers, judges, and corrections agencies).

59. See *id.* at 1-7, 14 (recounting a case in which a judge sentenced a fifteen-year-old first-time offender who pled guilty to possession of a handgun and small amount of marijuana to six months in a dungeon-like juvenile detention facility).

60. See also Bright & Keenan, *supra* note 5, at 784-92, 795-800, 803-11 (documenting that elected judges in capital cases failed to enforce defendants’ constitutional rights, showed a higher tendency to impose the death penalty, and delegated their decision-making function to prosecutors). See generally Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317 (2010) (documenting the “personal and systemic bias” of tough-on-crime judges and calling for their disqualification from presiding over criminal cases).

61. Judges would never make the mistake that comedian Bill Maher recently made, when referring to himself as a “house n*****” in an interview with Nebraska Senator Ben Sasse. See Dean Obeidallah, *Bill Maher’s Use of ‘N-Word’ Is No Joke*, CNN <http://www.cnn.com/2017/06/03/opinions/bill-maher-n-word-not-funny-obeidallah/index.html> (last updated June 3, 2017, 10:59 PM).

“So nice to see a Kelly here from legal services. We usually get Schwartzbaums and Goldsteins.”

Once, I was in the middle of an impassioned closing argument in a murder case. The defense was self-defense and I was trying to convey how frightened my client was under the circumstances leading up to the killing. Things were happening fast: my client was cornered; he had no other choice. My delivery of this argument was rapid but the court reporter was having no problem keeping up. Suddenly, the judge interrupted my closing and called me to sidebar with the prosecutor. “Ms. Smith,” he said. “Where are you from—New York, Philadelphia?” I had no idea what he was driving at. I wanted to say, “Your Honor, now is not a good time to get to know me.” I looked at the judge quizzically. He said, “Slow down. You’re talking too fast.”

I said okay and got back to my closing. I didn’t have time to think about it. Afterwards, my co-counsel called the judge’s conduct anti-Semitic. I am recognizably Jewish. As it happens, I’m not from either New York or Philadelphia (I was born and raised in Chicago’s Northshore), though I’ve lived in both cities. According to my co-counsel, this was the judge’s shorthand for cities with large Jewish populations.

Another incident was less ambiguous. During a cross-examination in a juvenile delinquency matter, the trial judge suddenly became angry at my use of leading questions (which is, of course, a hallmark of cross). “Ms. Smith,” the judge admonished, “Do not put words in the witness’s mouth. There will be no shysters in my courtroom.”

One judge told a dark-skinned black man to smile during a power outage in the courthouse so that he could see him.⁶²

I doubt the older white male D.C. Superior Court judge who locked up the young black female public defender would have done that to a white man. Another white male judge in the D.C. trial court threatened to lock up a black male public defender (though he ultimately backed off). But it’s not just white male judges. An African American woman judge once locked up an African American woman public defender in D.C.

There is a persistent casual sexism in court in which male lawyers are taken more seriously than female lawyers. It is subtle but palpable (female judges may also perceive that they are taken less seriously than male judges).

62. Elsa Walsh, *D.C. Judge Assailed for Racial Remarks to Prosecutor*, WASH. POST (June 12, 1987), https://www.washingtonpost.com/archive/local/1987/06/12/dc-judge-assailed-for-racial-remarks-to-prosecutor/35fd72e4-86af-4af0-83fe-c1e5c79b87ee/?utm_term=.4b2ebb922ea4.

One judge made a public defender who was seven months pregnant stand during a lengthy voir dire. Another judge refused to allow a breast-feeding public defender regular breaks to pump breast milk.⁶³ Judges are routinely dismissive of scheduling concerns related to parenting. Before women in pant suits became commonplace (think Hillary Clinton), some judges used to refuse to let women lawyers wear pants in his courtroom.

When I was a public defender, I used to appear before an older male judge who ran “motions court,” a courtroom devoted to a range of miscellaneous motions and issues. There was a period when a female colleague and I were assigned to his courtroom. After we had concluded the day’s hearings, he would turn to us and say, “What are you girls doing now—going shopping?”⁶⁴

Judges can be complacent about their ability to overcome implicit or unconscious bias. In 2016, there was a public gathering at which five judges who were seeking to become the Chief Judge of the D.C. Superior Court answered questions from the audience (submitted anonymously on index cards). One of the questions was how the candidates might deal with implicit or unconscious bias on the bench. One after another, each judge maintained that the D.C. Superior Court was an especially impressive and enlightened court, that all judges were committed to being fair and impartial, and they had had “a training” on implicit bias so it wasn’t a problem.

VI. CONCLUSION: WHAT’S A DEFENDER TO DO?

Let me acknowledge again that being a judge is not easy. The responsibility is awesome. Moreover, even the best, most well-intentioned judges can get worn down by the daily grind of the system. This is particularly so for state trial court judges; the size of many urban court dockets could fell the most indefatigable judge. Those interested in becoming a judge should have eyes wide open about how challenging, exhausting, and lonely being on the bench can be.

But the slog of judging is no excuse for bullying. The demands of the work are no excuse for meanness.

63. See Staci Zaretsky, *Breast-Feeding Is Against the Law in This Judge’s Courtroom*, ABOVE THE LAW (June 23, 2015, 1:30 PM), <http://abovethelaw.com/2015/06/breastfeeding-is-against-the-law-in-this-judges-courtroom> (reporting that a Miami-Dade County judge refused to accommodate a defender’s request for a fifteen-minute break every three to four hours during trial so that she would be able to pump breast milk).

64. I admit that we did occasionally stop at the local department store, Wanamaker’s, which was right next to the courthouse, on our way back to the office. But so did some of our male colleagues.

The problem is that no one calls these judges out on their improper behavior—except, under exceptional circumstances, a disciplinary commission or appellate court⁶⁵ or the press.⁶⁶ Court staff—clerks, court officers, bailiffs, court reporters, probation officers—have little incentive to criticize judges and are loath to do so in view of their place on the court totem pole. Other trial judges feel it is none of their business unless they have a supervisory role.

Trial lawyers cannot call judges out on their bullying without risking reprisal. Many lawyers—especially public defenders—are repeat players. Even if indignation is warranted in the moment, we have to be mindful of the impact on other clients. We properly place our clients—current and future—ahead of our own hurt feelings or wounded egos.

But maybe we shouldn't. Rule 8.3(b) of the American Bar Association's Model Rules of Professional Conduct, on maintaining the integrity of the profession and reporting misconduct, requires "[a] lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."⁶⁷ The comment to Rule 8.3 notes that self-regulation of the legal profession includes initiating a disciplinary investigation when a lawyer encounters misconduct by judges as well as lawyers.⁶⁸ The comment further notes that lawyers should report even an "apparently isolated violation," as this might "indicate a pattern of misconduct that only a disciplinary investigation can uncover."⁶⁹

But it takes guts. First, you have to put aside the belief that "bench slaps"⁷⁰—or bench *punches*—are a normal part of law practice. Second, you have to be willing to confront power directly, knowing it probably won't go well.

I don't know what would have happened if, instead of prostrating myself before that judge who became apoplectic at my crack about PTSD, I had said, "Look, I'm sorry I offended the Court, but your

65. See, e.g., *Miss. Comm'n on Judicial Performance v. Littlejohn*, 2014-JP-01184-SCT (¶1) (Miss. 2014).

66. See, e.g., *Brevard Judge Tells Attorney 'I'll Beat Your Ass,' Allegedly Throws Punches*, *supra* note 30.

67. MODEL RULES OF PROF'L CONDUCT r. 8.3(b) (AM. BAR ASS'N 2016).

68. *Id.* r. 8.3 cmt.

69. *Id.*

70. See MATTHEW BOWERS, *BENCHSLAPPED: PUBLICLY HUMILIATING JUDICIAL OPINIONS* 8-9 (2012) (defining benchslaps as "when a judge humiliates an attorney, insults another judge, or reverses a lower court in a particularly demeaning manner" (citing Count Christoph von Stoph-Stopheron, *Benchslaps*, URB. DICTIONARY (Oct. 18, 2007), <http://www.urbandictionary.com/define.php?term=benchslap>)).

rebuke is excessive, bordering on bullying. Please stop.” What if this exchange happened at sidebar so the judge wouldn’t feel publicly criticized? What’s the worst the judge could have done—tell me I’m over-sensitive? Get even madder? Threaten contempt? (Such a charge would plainly be baseless under these circumstances.)

It asks a lot of a young lawyer to confront a judge for bullying, but some of us have the credibility and gravitas to do it and perhaps have an impact. If judges won’t police themselves, lawyers have to do it.